2009

State of Utah v.Lucia and Vanessa Arnold : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH Plaintiff/Appellee v. LUCIA AND VANESSA ARNOLD Defendants/Appellants	**Case No. 20090854-CA**

REPLY BRIEF OF APPELLANT

Appeal from judgment, sentence, and commitment in the Fourth District Court, Utah County, State of Utah, the Honorable Gary D. Stott and the Honorable David N. Mortensen presiding, on one count each of third degree felony retail theft.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

IN THE UTAH COURT OF APPEALS

STATE OF UTAH Plaintiff/Appellee v. LUCIA AND VANESSA ARNOLD Defendants/Appellants	Case No. 20090854-CA

REPLY BRIEF OF APPELLANT

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ARGUMENT

I. THE ARNOLDS' INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM IS ADEQUATELY BRIEFED.

The State argues that the Arnolds' ineffective assistance of counsel claim is inadequately briefed because 1) the "Argument" section of the Arnolds' brief does not identify particular questions the State asked that opened the door to evidence concerning Skip Curtis, and 2) the brief does not set forth the standards by which a party "opens the door" to admission of previously excluded evidence. Brief of Appellant, pp. 15-16.

The Arnolds' claim is adequately briefed. The State's arguments go to the first prong of Strickland v. Washington, 466 U.S. 668 (1984). Under the first prong of Strickland, the Arnolds must establish that trial counsel performed deficiently by failing to argue that the State opened the door to evidence concerning Skip Curtis at trial. 466 U.S. 668, 688-691 (1984). The Arnolds can satisfy this prong by showing that 1) such an argument would not have been futile, and 2) trial counsel's failure to raise the issue was

not a strategic decision. Id. at 688-691; cf. State v. Leber, 2007 UT App 273, ¶ 23, 167 P.3d 1091 (quoting State v. Whittle, 1999 UT 96, 989 P.2d 52 ("The failure of counsel to make motions or objections which would be futile if raised does not constitute ineffective assistance.")). The State essentially argues that the Arnolds' brief is inadequate because it fails to do the first of these: that is, it fails to show that an argument that the State "opened the door" would not have been futile.

However, such a showing is implicit in the Arnolds' brief because the Arnolds' brief notes the trial court's ruling that the State opened the door to evidence concerning Skip Curtis at trial. See Brief of Appellant, pp. 5-6. In addressing the Arnolds' post-trial motion to arrest judgment, the trial court ruled that the State "opened the door" when the prosecutor cross-examined the Arnolds as to the apparent lack of motive for a conspiracy against them. R. 188; Brief of Appellant, pp. 5-6. The trial court relied on trial counsel's failure to raise this issue at trial as one of the grounds for denying the Arnolds' motion to arrest judgment. R. 197; see Brief of Appellant, pp. 5-6.

The brief's exposition of the trial court's ruling disposes of the question whether an argument at trial that the State "opened the door" would have been futile. Barson By and Through Barson v. E.R. Squibb & Sons, Inc., 682 P.2d 832, 840 (Utah 1984) ("Curative admissibility of evidence is a matter within the discretion of the trial court, and we will not disturb that decision absent an abuse of discretion"); See State v. Colwell, 2000 UT 8, ¶ 12, 994 P.2d 177 ("When reviewing a trial court's denial of a motion for a new trial, we will not reverse absent a clear abuse of discretion by the trial court") (internal citations and quotations omitted); cf. State v. Mecham, 2000 UT App

247, ¶ 19, 9 P.3d 777 ("In ruling on an ineffective assistance claim following a Rule 23B hearing, we defer to the trial court's findings of fact, but review its legal conclusions for correctness") (internal citations and quotations omitted).

Thus, the remaining question for the Arnolds' brief under the first prong of Strickland is whether trial counsel's failure to raise the issue at trial "might be considered sound trial strategy." 466 U.S. at 689, 694 (1984). This issue is adequately addressed. See Brief of Appellant, pp. 9-15. The analysis of Strickland's first prong is not "so lacking as to shift the burden of research and argument to the reviewing court," and this Court should decide the Arnolds' ineffective assistance of counsel claim on its merits. State v. Sloan, 2003 UT App 170, ¶ 13, 72 P.3d 138.

II. THE ARNOLDS WERE PREJUDICED BECAUSE THE EXCLUSION OF EVIDENCE CONCERNING SKIP CURTIS HAD A PERVASIVE EFFECT ON THE OTHER EVIDENCE PRESENTED AT TRIAL.

The State argues that there is no reasonable probability that evidence concerning Skip Curtis would have changed the outcome of the trial because the totality of the evidence against the Arnolds was overwhelming. Brief of Appellant, pp. 19-21 (citing State v. Hales, 2007 UT 14, ¶ 86, 152 P.3d 321). However, the State does not acknowledge that the relative strength of its evidence at trial would have been significantly diminished if the Arnolds had been permitted to present evidence concerning Skip Curtis.

The State notes that the Arnolds' "only response [to the State's evidence] at trial was to offer their own contrary version of events." Brief of Appellee, p. 21. However, this was the Arnolds' only response because the evidence that supported their theory of

the case had been excluded by the tistrict court. After the State opened the door, the Arnolds' trial counsel should have sought to admit evidence supporting the Arnolds' theory of the case: that Vanessa Arnold had sued Skip Curtis, that Officers Hendricksen and Stradling identified Vanessa Arnold as "the individual that sued Skip Curtis," and that after Vanessa Arnold's arrest, Officer Stradling drove her to a location where she was physically threatened by Skip Curtis. R. 244:4-5. This evidence would have supported the Arnolds' contrary version of events with a motive for the alleged conspiracy against them, thus altering the entire evidentiary picture at trial.

As the State points out, the Arnolds' defense at trial hinged entirely on their own personal credibility. The inability on the Arnolds' part to present evidence of any motive for the conspiracy they alleged at trial surely damaged their credibility severely, having "a pervasive effect on the inferences to be drawn from the evidence." Hales, 2007 UT at ¶ 86 (quoting Strickland, 466 U.S. at 695-696). The State took advantage of this pervasive effect, opening its cross-examination of Lucia Arnold with questions such as "Dillard's Department Store really wants to hurt you and your daughter, doesn't it?", "Mr. Hendrickson [sic], he really wants to hurt you, doesn't he?" and "Scott McDermeit, he wants to hurt you as well?" R. 243:300-301.

The State then concluded its closing argument: "Then finally, the biggest straw man of all is this giant conspiracy to – for whatever reason, to frame the defendants with shoplifting, and to escape the consequences of sexual assault and physical assault." R. 243:379. The Arnolds were prejudiced by their inability to answer these questions and arguments with evidence of a motive for the alleged conspiracy.

The evidentiary circumstances of this case are similar to State v. Hales, 2007 UT 14, 152 P.3d 321. In Hales, the defendant was convicted of murder for allegedly shaking a child and causing brain injuries which were ultimately fatal. Id. at ¶ 1. At trial, the State presented an expert witness who testified that CT scans depicting the brain injuries indicated that they were caused by violent shaking during the time that the defendant was caring for the child. Id. at ¶¶ 75-78. Although the CT scans were subject to a different interpretation, which showed that the injuries occurred before the time during which the defendant was caring for the child, trial counsel failed to subject the CT scans to an expert qualified to review them. Id. at ¶ 71.

The Utah Supreme Court held that the failure of trial counsel to have the CT scans reviewed by a qualified expert was sufficiently prejudicial to constitute ineffective assistance of counsel. Id. at ¶¶ 84-92. The Court noted that the trial jury was presented with no basis for believing that the injuries occurred before the time that the defendant was caring for the child. Id. at ¶ 89. The Court held that there was a reasonable probability that a qualified expert's alternative interpretation of the CT scans would have negated the State's ability to rely on their expert's interpretation of the CT scans as conclusive evidence of the defendant's guilt, and been sufficient to raise a reasonable doubt as to the defendant's guilt. Id. at ¶ 92.

In this case, the jury was presented with no basis for believing that the State's witnesses were involved in a conspiracy to frame the Arnolds for shoplifting. Had the Arnolds been able to present evidence concerning Skip Curtis, the State would not have been able to focus on the lack of motive for the alleged conspiracy on cross-examination

and during closing argument. There is a reasonable probability that this evidence of motive, and the accompanying diminution in the strength of the State's evidence, would have been sufficient to raise a reasonable doubt as to the Arnolds' guilt. Thus, the Arnolds were prejudiced by their trial counsel's failure to attempt to introduce evidence concerning Skip Curtis after the State "opened the door."

CONCLUSION AND PRECISE RELIEF SOUGHT

Lucia and Vanessa Arnold ask that this Court reverse their convictions for retail theft because they were denied their constitutional right to effective assistance of counsel.

DATED this 17th day of May, 2011.

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CERTIFICATE OF MAILING

I hereby certify that I delivered two (2) true and correct copies of the foregoing Reply Brief of Appellant to the Appeals Division, Utah Attorney General, 160 East 300 South, Sixth Floor, P.O. Box 140854, Salt Lake City, UT 84114, this 17th day of May, 2011.